

October 21, 1993

The Honorable Virginia Goldstein
Planning Director
County of Hawaii
25 Aupuni Street, Room 109
Hilo, Hawaii 96720-4252

Dear Ms. Goldstein:

Re: Disclosure of Membership List of The Citizens for
Protection of the North Kohala Coastline

This is in reply to your letter to the Office of Information Practices ("OIP") dated June 10, 1993, requesting an advisory opinion concerning the public's right to inspect and copy the membership list of The Citizens for Protection of the North Kohala Coastline (also known as Hui Lihikai).

ISSUE PRESENTED

Whether, under the Uniform Information Practices Act (Modified), chapter 92F, Hawaii Revised Statutes ("UIPA"), the County of Hawaii Planning Department ("Department") must make a list of the names and addresses of the members ("membership list") of The Citizens for Protection of the North Kohala Coastline ("CPNKC") available for public inspection and copying.

BRIEF ANSWER

No. For the reasons described below, in our opinion, the disclosure of the names and addresses of the individuals who are members of CPNKC as contained on the CPNKC membership list would constitute a "clearly unwarranted invasion of personal privacy" under the UIPA. See Haw. Rev. Stat. 92F-13(1) (Supp. 1992). Accordingly, we conclude that the Department may not make this information available for public inspection and copying.

OIP Op. Ltr. No. 93-20

FACTS

In your letter to the OIP dated June 10, 1993, you explained that CPNKC had requested the County of Hawaii Planning Commission ("Commission") to conduct a contested case hearing concerning the applications submitted by Chalon International of Hawaii, Inc. ("Chalon") for permits to build a resort in North Kohala, Hawaii.¹ Following CPNKC'S hearing request, the Commission requested CPNKC to submit certain items of information to enable the Commission to make a "determination of [CPNKC's] standing for a contested case."

With its response to the Commission's May 20, 1993 letter, CPNKC included a copy of its membership list.² In a telephone conversation on June 16, 1993, Mr. Rodney Nakano of the Department informed the OIP that the membership list consisted of "seven pages, double-sided," and contained the names and addresses (either street addresses or post office boxes) of CPNKC'S members. Mr. Nakano provided the OIP with one page from the membership list for its review, as requested by the OIP.

CPNKC's June 2, 1993 letter to the Commission, which you provided for our review, states that "[CPNKC's] steering committee has a policy of not releasing our mailing list, but we want to show you the wide cross section of the community represented and feel that you will respect the confidentiality of our list. We have had no resignations because of [this] policy for the past three years."

In a June 11, 1993 letter to the Department and the Commission, Chalon's legal counsel requested that the Department provide Chalon with a copy of CPNKC's membership list. The letter states that "[w]e are unaware of any law that would restrict Chalon from reviewing and obtaining a copy of the membership list of CPNKC." The letter further states:

Chalon believes that keeping the list confidential may prejudice Chalon from proper cross examination of prospective witnesses at the upcoming Planning Commission hearing. As

¹Letter from Donald L. Manalili, Commission Chairman, to Toni Withington, CPNKC Steering Committee Chairperson (May 20, 1993).

²Letter from Toni Withington, CPNKC Steering Committee Chairperson, to Donald Manalili, Commission Chairman (June 2, 1993).

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you know, Ms. Withington herself has made the disclosure of the membership list an issue because she is attempting to intervene in a contested case proceeding as the representative of that organization. In providing the list to the Planning Department in support of her intervention request, we assert that she has waived any claim for confidentiality. We also assert that due process requires that we be able to review the list to prepare our rebuttal to her claims raised in the above Planning Commission hearings.

On June 16, 1993, the Commission denied CPNKC's request for contested case hearing and granted a Special Management Area Use Permit to Chalon.

On July 15, 1993, CPNKC appealed to the Circuit Court of the Third Circuit from the Commission's final determination granting a Special Management Area Use Permit to Chalon and denying CPNKC's request for contested case hearing.³ In connection with the appeal, there are court orders dated July 15, 1993 and July 29, 1993 that direct the Commission to certify and transmit to the Court the "Record on Appeal." The "Record on Appeal" is "the entire file of the Hawaii County Planning Commission, including therein the files of the Planning Department, County of Hawaii, concerning the application of Chalon International of Hawaii, Inc. for Special Management Area Use Permit No. 341, Application No. 91-3." The OIP is informed that the Record on Appeal includes the CPNKC membership list, and the membership list has been or will be transmitted to the Court, pursuant to the Court's Orders.

³Notice of Appeal to Circuit Court, Citizens for Protection of the North Kohala Coastline v. Hawaii County Planning Commission, Civil No. 93-418 (July 15, 1993), as amended by Appellants' First Amended Notice of Appeal to Circuit Court, Citizens for Protection of the North Kohala Coastline v. Hawaii County Planning Commission and Chalon International of Hawaii, Inc., Civil No. 93-418 (July 29, 1993).

DISCUSSION

I. INTRODUCTION

The UIPA generally provides that "[a]ll government records are open to public inspection unless access is restricted or closed by law." Haw. Rev. Stat. 92F-11(a) (Supp. 1992). Thus, "[e]xcept as provided by section 92F-13, each agency upon request by any person shall make government records available for inspection and copying." Haw. Rev. Stat. 92F-11(b) (Supp. 1992). Under the UIPA, the term "government record" means "information maintained by an agency in written, auditory, visual, electronic or other physical form." Haw. Rev. Stat. 92F-3 (Supp. 1992); Kaapu v. Aloha Tower Development Corp., ____ Haw. ____, No. 15775 (Feb. 25, 1993). Because the Department is an "agency"⁴ that "maintains" the membership list, the UIPA's provisions govern access to the membership list. The fact that the Department received the membership list in the context of a request for a contested case hearing does not alter the applicability of the UIPA's disclosure provisions, as it is still a record "maintained" by an "agency."

Therefore, unless protected by at least one of the UIPA's five statutory exceptions to required agency disclosure, CPNKC's membership list must be made available for public inspection and copying. Two of the exceptions set forth in section 92F-13, Hawaii Revised Statutes, potentially apply to information in the membership list. These are the UIPA's exceptions for: (1) a clearly unwarranted invasion of personal privacy, and (2) government records that are protected by state or federal law.

We now turn to separately examine the applicability of these exceptions to the information in CPNKC's membership list.

II. CLEARLY UNWARRANTED INVASION OF PERSONAL PRIVACY

Section 92F-13(1), Hawaii Revised Statutes, provides an exception to required agency disclosure for "[g]overnment records which, if disclosed, would constitute a clearly unwarranted invasion of personal privacy." The UIPA recognizes only the "privacy interests of the individual." Haw. Rev. Stat.

92F-14(a) (Supp. 1992). The term "individual" means a natural person." Haw. Rev. Stat. 92F-3 (Supp. 1992). Consequently,

⁴The definition of "agency" includes any unit of county government and departments. See Haw. Rev. Stat. § 92F-3 (Supp. 1992).

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the OIP has previously noted that corporations, associations, and other fictional entities do not have privacy interests recognized under the UIPA. See, e.g., OIP Op. Ltr. No. 92-17 (Sept. 2, 1992). Therefore, the UIPA's "clearly unwarranted invasion of personal privacy" exception does not apply to the names and addresses of CPNKC members who are not "individuals."

The UIPA's personal privacy exception involves a "balancing" of competing interests. Specifically, the UIPA states that "[d]isclosure of a government record shall not constitute a clearly unwarranted invasion of personal privacy if the public interest in disclosure outweighs the privacy interests of the individual." Haw. Rev. Stat. 92F-14(a) (Supp. 1992). Additionally, an individual must have a "significant" privacy interest in a government record before the UIPA's privacy exception will apply to that record. See S. Conf. Comm. Rep. No. 235, 14th Leg., 1988 Reg. Sess., Haw. S.J. 689, 690 (1988); H. Conf. Comm. Rep. No. 112-88, Haw. H.J. 817, 818 (1988) ("[o]nce a significant privacy interest is found, the privacy interest will be balanced against the public interest in disclosure").

We next examine whether an individual has a "significant" privacy interest in the fact that the individual is a member of CPNKC.

A. Names

The United States Supreme Court has "recognized the vital relationship between freedom to associate and privacy in one's associations." NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 462 (1958); see also Brown v. Socialist Workers '74 Camp. Comm., 459 U.S. 87, 91 (1982) ("a right to privacy in one's political associations and beliefs"); Marshall v. J.P. Stevens Emp. Ed. Comm., 495 F. Supp. 553 (1980) ("[s]hould government invade an association's privacy, its members might be induced to withdraw and they may dissuade others from joining it because of fear their beliefs may be exposed through their associations"); 67 Cal. Op. Atty. Gen. 414 (1984) (privacy in associations, including privacy of membership lists of a constitutionally valid organization, identified as one of the constitutional "zones of privacy").

In NAACP v. Alabama ex rel. Patterson, the United States Supreme Court unanimously held that the state of Alabama could not compel the NAACP to disclose to that state's Attorney General the names and addresses of its rank and file Alabama members. The Court stated that the "inviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a

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group espouses dissident beliefs." NAACP, 357 U.S. at 462.

The NAACP had demonstrated to the Court that on past occasions disclosure of the identities of its rank and file members had exposed them to economic reprisal, loss of employment, threat of physical coercion, and other public hostility. Under those circumstances, the Court found that compelled disclosure was "likely to affect adversely the ability of petitioner and its members to pursue their collective effort to foster beliefs which they admittedly have the right to advocate, in that it may induce members to withdraw from the Association and dissuade others from joining it because of fear of exposure of their beliefs shown through their associations and of the consequences of this exposure." Id. at 462-463. The Court found that the NAACP's interest in nondisclosure was "so related to the right of the members to pursue their lawful private interests privately and to associate freely with others in so doing as to come within the protection of the Fourteenth Amendment." Id. at 466.

We express no opinion concerning whether, based on the foregoing United States Supreme Court cases, the disclosure of the names of CPNKC members would violate their constitutional rights to privacy and association.⁵ In our opinion, however, these court decisions indicate that individuals have a "significant" privacy interest in information that reveals their associations and affiliations, thereby exposing their beliefs and ideas. Additionally, the Hawaii Supreme Court observed that article I, section 7 of the Constitution of the State of Hawaii⁶ was intended to prevent "overbroad governmental intrusion" in matters that reveal an individual's "activities, associations, and beliefs." State v. Tanaka, 67 Haw. 658, 662, 701 P.2d 1274 (1985); see OIP Op. Ltr. No. 90-30 (Oct. 23, 1990) (individuals have a significant privacy interest in information, including library circulation records, which reveals their thoughts, associations, or beliefs).

⁵However, the UIPA's personal privacy exception was intended to implement the individual's right to privacy under sections 6 and 7 of article I of the Constitution of the State of Hawaii. See Haw. Rev. Stat. § 92F-2 (Supp. 1992).

⁶Article I, section 7 of the State Constitution provides in part that "[t]he right of the people to be secure in their persons, houses, papers and effects against unreasonable searches, seizures and invasions of privacy shall not be violated."

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Having determined that an individual has a significant privacy interest in information that reveals that the individual is a member of CPNKC, we now turn to an examination of whether, under the UIPA's balancing test, the public interest in disclosure outweighs the privacy interests of the individual. See Haw. Rev. Stat. 92F-2 and 92F-14(a) (Supp. 1992).

In previous OIP advisory opinions, we concluded that the "public interest" to be considered under the UIPA's balancing test is the public interest in the disclosure of official information that sheds light on an agency's performance of its statutory purpose and in information that sheds light upon the conduct of government officials. OIP Op. Ltr No. 90-7 (Feb. 9, 1990); see also OIP Op Ltr. No. 93-1 (Apr. 8, 1993); OIP Op. Ltr. No. 92-17 (Sept. 2, 1992). We reached this conclusion in view of two basic policies served by the UIPA, which are to "[p]romote the public interest in disclosure" and to "[e]nhance governmental accountability through a general policy of access to government records." Haw. Rev. Stat. 92F-2 (Supp. 1992). Further, in enacting the UIPA, the Legislature declared that "it is the policy of this State that the formation and conduct of public policy--the discussions, deliberations, decisions, and action of government agencies--shall be conducted as openly as possible." Haw. Rev. Stat. 92F-2 (Supp. 1992).

However, the Legislature also acknowledged that "[t]he policy of conducting government business as openly as possible must be tempered by a recognition of the right of the people to privacy, as embodied in section 6 and section 7 of Article I of the Constitution of the State of Hawaii." Id. Additionally, we have previously opined that the public interest underlying the UIPA is "not fostered by disclosure of information about private citizens that is accumulated in various government files but that reveals little or nothing about an agency's own conduct." OIP Op. Ltr. No. 89-16 (Dec. 27, 1989), quoting United States Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749 (1989).

In our opinion, the disclosure of the names of individuals who are CPNKC members would not shed significant light on either the Department's statutory duties or the conduct of its employees. Consequently, we believe that under the UIPA's balancing test, the public interest in the disclosure of a record revealing the names of the members of CPNKC does not outweigh an individual member's significant privacy interest in that information. Accordingly, we conclude that the disclosure of this information would generally constitute a clearly unwarranted invasion of personal privacy under section 92F-13(1), Hawaii

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B. Addresses

In previous advisory opinion letters, the OIP has determined that under the UIPA an individual's home address, as contained in a government record, must not be made available for public inspection and copying, because disclosure would constitute a "clearly unwarranted invasion of personal privacy." See, e.g., OIP Op. Ltr. No. 89-13 (Dec. 12, 1989); OIP Op. Ltr. No. 89-16 (Dec. 27, 1989); OIP Op. Ltr. No. 90-10 (Feb. 26, 1990); OIP Op. Ltr. No. 90-25 (July 12, 1990). Further, the OIP has determined that mailing addresses that cannot be differentiated from home addresses must also not be publicly disclosed, and that an "individual's privacy interest in a post office box number is minimal because a post office box number does not reveal the location of a person's residence." OIP Op. Ltr. No. 91-19 at 6 (Oct. 18, 1991); see also OIP Op. Ltr. No. 92-11 (Aug. 12, 1992).

In this case, there is no indication whether the street addresses on the membership list are home or business addresses.

Therefore, based on the foregoing opinion letters, we conclude that the street addresses on the membership list must not be made available for public inspection and copying. Further, we believe that the post office box numbers must also remain confidential. Disclosure of the post office box numbers may result in the disclosure of the identities of individual CPNKC members, which we have found to be protected by section 92F-13(1), Hawaii Revised Statutes.⁷

III. RECORDS PROTECTED BY STATE OR FEDERAL LAW

The UIPA does not require the disclosure of "[g]overnment records which, pursuant to state or federal law including an order of any state or federal court, are protected from disclosure." Haw. Rev. Stat. 92F-13(4) (Supp. 1992). Based on the decisions in the United States Supreme Court cases discussed

⁷The United States Postal Service will furnish the "recorded name, address, and telephone number of the holder of a post office box being used for the purpose of doing or soliciting business with the public, and any person applying for a box in behalf of a holder . . . to any person upon request." Privacy Act Issuances, Fed. Reg., vol. V, 441 (1991 Compilation). Thus, if one had a list of the post office box numbers of CPNKC members, one could gain access to identifying information concerning those individual CPNKC members, if any, who use their post office boxes for business purposes.

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in section II above, CPNKC's membership list may, arguably, be "confidential" under the constitutions of the United States and Hawaii. However, because we have found that section 92F-13(1), Hawaii Revised Statutes, protects the information in the membership list from required agency disclosure to the public, we need not examine the applicability of section 92F-13(4), Hawaii Revised Statutes, or express an opinion on this question.

IV. WAIVER OF PRIVACY RIGHTS

As stated earlier, Chalon's legal counsel contends that CPNKC has waived any claim for confidentiality by providing the membership list to the Department. The UIPA recognizes the waiver of privacy rights by the written consent of each individual to whom a record pertains. Haw. Rev. Stat.

92F-12(b)(1) (Supp. 1992) (agencies are required to disclose "[a]ny government records, if the requesting person has the prior written consent of all individuals to whom the record refers"). However, that consent provision is not applicable to the facts before us. Therefore, we find no waiver of privacy rights by the individual CPNKC members.

Finally, we observe that based on the facts presented, we need not, and do not, address either a discovery request for the issuance of a subpoena for the production of records by a party (or other person) in a contested case hearing, nor any discovery practices pursuant to the rules of court. Further, the requester's "need" for a government record is generally irrelevant to a determination of whether the record must be made available for public inspection and copying under the UIPA. See Haw. Rev. Stat. 92F-11(b) (Supp. 1992) ("upon request by any person"); OIP Op. Ltr. No. 90-35, at 14 (Dec. 17, 1990) ("under the UIPA, the purpose for which a record is sought is generally irrelevant").

CONCLUSION

For the reasons stated above, we conclude that the names and addresses of the individuals who are members of CPNKC are protected from public disclosure under section 92F-13(1), Hawaii Revised Statutes. Accordingly, the Department may not make this information available for public inspection and copying under the UIPA.

Very truly yours,

Mimi K. Horiuchi

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